

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 1000 FRIENDS OF OREGON, NEIGHBORS FOR CLEAN AIR,
5 and NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
6 *Petitioners,*

7
8 vs.

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10 CITY OF PORTLAND,
11 *Respondent,*

12
13 and

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15 FASTER PERMITS and PROLOGIS,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2023-088

19
20 ORDER

21 The challenged decision is a commercial building permit issued to
22 intervenors-respondents (intervenors) for a “New tilt-up concrete tilt-up semi-
23 heated warehouse building with one office tenant space; including associated site
24 work” (Warehouse). Record 1. Intervenors move to dismiss the appeal on the
25 basis that the challenged decision is excluded from LUBA’s jurisdiction under
26 ORS 197.015(10)(b)(B), which we discuss below. In an order dated February 2,
27 2024, we suspended the appeal and allowed petitioners to respond to the motion
28 to dismiss. Petitioners then filed a response. We now resolve the motion to
29 dismiss.

1 **JURISDICTION**

2 LUBA has exclusive jurisdiction to review land use decisions. ORS
3 197.825(1).¹ ORS 197.015(10)(a) defines “[l]and use decision” to include “[a]
4 final decision or determination made by a local government or special district
5 that concerns the adoption, amendment or application of * * * [a] land use
6 regulation[.]” ORS 197.015(10)(a)(iii).

7 ORS 197.015(10)(b) lists nearly a dozen types of decisions that over the
8 years the legislature has provided are *not* “land use decisions” as described in
9 ORS 197.015(10)(a), and thus are excluded from LUBA’s jurisdiction, even if
10 those decisions might otherwise qualify as “land use decisions.” As relevant here,
11 ORS 197.015(10)(b)(B) excludes from LUBA’s jurisdiction a local government
12 decision to approve or deny a building permit made under “clear and objective
13 land use standards[.]” We sometimes refer to that provision as “the building
14 permit exclusion.”

15 Intervenors move to dismiss the appeal on the basis that the decision to
16 issue a building permit for the Warehouse is excluded from LUBA’s jurisdiction

¹ ORS 197.825(1) provides in part:

“[LUBA] shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.”

1 under ORS 197.015(10)(b)(B) because it was a decision to approve a building
2 permit made under clear and objective land use standards.

3 It is undisputed that the city reviewed intervenors' building permit
4 application for compliance with several provisions of the city's zoning code,
5 including Portland City Code (PCC) 33.140.130 and PCC 33.262. Record 362,
6 1226-1227. The purpose of PCC 33.262 is "to protect all uses in the R, C, CI, IR,
7 and OS zones from certain objectionable off-site impacts associated with
8 nonresidential uses." PCC 33.262.10. PCC 33.262 includes standards for
9 regulating and limiting off-site impacts from noise, vibration, odor, and glare.
10 According to intervenors, all of the PCC standards that the city applied are "clear
11 and objective land use standards."

12 Petitioners argue that the PCC 33.262.070 standard for determining off-
13 site impacts from odor is not "clear" or "objective." PCC 33.262.070 provides:

14 "A. Odor standard. Continuous, frequent, or repetitive odors may
15 not be produced. The odor threshold is the point at which an
16 odor may just be detected[.]

17 "B. Exception. An odor detected for less than 15 minutes per day
18 is exempt." (Boldface omitted.)

19 In determining whether the building permit is excluded from our
20 jurisdiction under ORS 197.015(10)(b)(B), the question we must answer is
21 whether the land use standards under which it was issued are "clear and
22 objective." We have explained that in the context of construing that phrase in
23 ORS 197.015(10)(b)(B), we must determine whether the standards under which

1 the permit was issued are “ambiguous.” See *Richmond Neighbors v. City of*
2 *Portland*, 66 Or LUBA 464, 466 (2012) (citing *Tirumali v. City of Portland*, 169
3 Or App 241, 246, 7 P3d 761 (2000), *rev den*, 331 Or 674 (2001)).² We have
4 explained that the term “clear” means “easily understood” and “without obscurity
5 or ambiguity,” and that the term “objective” means “existing independent of
6 mind[.]” *Nieto v. City of Talent*, ___ Or LUBA ___ (LUBA No 2020-100, Mar
7 10, 2021) (slip op at 9 n 6).

8 Petitioners argue that the PCC does not define the term “odor,” and the
9 term “odor” can be interpreted in multiple ways to mean all smells, or only
10 unpleasant smells. Petitioners also argue that where the provision prohibits
11 “continuous, frequent, or repetitive odors” without defining those terms, the
12 provision requires both interpretation of the terms, and subjective, value-laden
13 analyses to ascertain their meaning and application. Petitioners further argue that
14 the provision ambiguously prohibits an odor “at the point at which an odor may
15 just be detected[.]” which fails to identify where the measurement of a prohibited

² The Court of Appeals has explained that in the context of the requirement in former ORS 197.307(4), *renumbered as* ORS 197A.400(1), to apply only “clear and objective standards, conditions and procedures to the development of housing” that the standard has two, distinct parts. *Roberts v. City of Cannon Beach*, 316 Or App 305, 311-12, 504 P3d 1249 (2021), *rev den*, 370 Or 56 (2022). We see no reason to interpret the phrase “clear and objective” differently for purposes of the building permit exclusion.

1 odor should occur and without specifying any method for detection, or the level
2 of detection necessary to qualify as an impact.³ PCC 33.262.070(A).

3 We agree with petitioners that the PCC 33.262.070 standards for
4 measuring odor are not clear or objective, for the reasons identified by petitioners.
5 For the reasons explained above, the challenged decision concerns the application
6 of the PCC and does not fall within the building permit exclusion. Intervenors’
7 motion to dismiss is denied.

8 **RECORD OBJECTIONS**

9 The record was received by the Board on January 25, 2024. On February
10 2, 2024, petitioners filed objections to the record.⁴ Our February 2, 2024, order
11 suspending the appeal was issued prior to the deadline for filing objections to the
12 record. Accordingly, the parties shall have 14 days from the date of this order to
13 file any objections to the record. If no additional objections to the record are filed,
14 the city shall have 28 days from the date of this order to file its response to the
15 record objections.

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³ In addition, we note that while PCC 33.262.070(B) allows “odors lasting less than 15 minutes per day[,]” that provision does not explain how to determine compliance with the standard if an odor lasts more than 15 minutes per day, or explain whether it allows 15 continuous minutes of odor or 15 total minutes of odor in a one day period.

⁴ On February 13, 2024, while the appeal was suspended, petitioners filed corrected record objections.

1 Dated this 8th day of April 2024.

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Melissa M. Ryan

7 Board Chair